UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CAPE COD COMMERCIAL LINEN SERVICE, INC.,	)	
Plaintiff,	)	
v.	)	**Civil Action No. 13-10380-DJC**
DIAMOND CHEMICAL COMPANY, INC.,	)	
Defendant.	)	

MEMORANDUM AND ORDER

CASPER, J. **January 24, 2014**

I. Introduction

Plaintiff Cape Cod Commercial Linen Service, Inc. ("CCCLS") has filed this lawsuit against Defendant Diamond Chemical Company, Inc. ("Diamond") alleging breach of contract, breach of warranty, negligence, fraudulent and negligent misrepresentation and unfair and deceptive trade practices in violation of Mass. Gen. L. c. 93A. D. 6. Diamond has moved to dismiss the action. For the reasons discussed below, the motion to dismiss, D. 7, is DENIED.

II. Standard of Review

In considering a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6), the Court will dismiss a complaint or a claim that fails to plead "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). To state a plausible claim, a complaint need not contain

detailed factual allegations, but it must recite facts sufficient to at least "raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." Id. at 555. "In determining whether a complaint crosses the plausibility threshold, 'the reviewing court [must] draw on its judicial experience and common sense.'" García-Catalán v. United States, 734 F.3d 100, 103 (1st Cir. 2013) (quoting Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009)). "This context-specific inquiry does not demand 'a high degree of factual specificity.' Even so, the complaint 'must contain more than a rote recital of the elements of a cause of action.'" García-Catalán, 734 F.3d at 103 (internal citations omitted).

III. Factual Allegations

A. Factual Background & Procedural History

Unless otherwise noted, the relevant facts are as alleged in the amended complaint.

CCCLS, a Massachusetts corporation with its principal place of business in Hyannis, provides commercial laundry services to resorts, hotels and restaurants. D. 6 ¶ 2. Diamond, a New Jersey corporation, manufactures laundry and other institutional and industrial products that are used in the washing process. Id. ¶ 3. On February 9, 2012, Diamond proposed that it would provide CCCLS with a "comprehensive full service program" that would direct [Diamond] when formula or programming modifications were necessary. Id. ¶¶ 9-10; D. 6-1 at 3.[1] At the time, CCCLS was in the process of relocating to a new facility. D. 6 ¶ 9. Diamond represented that its "senior management" would "be involved with the installation" of Diamond's products at CCCLS's facility. Id. ¶ 11. On March 5, 2012, CCCLS accepted Diamond's proposals and provided a schedule for making the CCCLS facility operational by April 10, 2012. Id. ¶¶ 13-14.

[1] Prior to this interaction, the parties had a business relationship, although the complaint is silent as to the specific nature of that relationship. Id. ¶ 7.

On March 31, 2012, CCCLS entered into a Supply Agreement (the "Supply Agreement") with Diamond dated March 9, 2012. Id. ¶ 15. Paragraph 2 of the Supply Agreement provides that "[d]uring the term of this Agreement, Diamond shall sell and [CCCLS] shall buy . . . all of its washroom chemical products (Products) from Diamond." D. 6-1 at 23. Paragraph 7 obligates Diamond to furnish and "maintain at no charge, all tanks, dispensers and proportioning equipment which will be installed at [CCCLS]. The Equipment and all parts, connections, and their extensions supplied shall remain the property of Diamond." Id. Paragraph 10 contains a standard merger clause, affirming that the Supply Agreement supersedes any prior agreements between the parties. Id. In paragraph 11, Diamond disclaims all other warranties besides Diamond's standard warranty, including, but not limited to, the implied warranties of merchantability and fitness for a particular purpose. Id. In paragraph 12, Diamond disclaims liability "for any damage or injury . . . allegedly resulting or arising from, or related to or based upon, directly or indirectly, the Products or misuse of the Products by [CCCLS] or by third parties." Id.

CCCLS opened its new facility on May 3, 2012. D. 6 ¶ 17. Over the course of the next two months, however, CCCLS complained to Diamond that Diamond had failed to install correctly various pieces of the Equipment described in the Supply Agreement. Id. ¶¶ 18-22. Meanwhile, CCCLS was receiving complaints from its customers concerning "yellowing, poor quality, the whites are not white." Id. ¶ 24.

Between May 3 and June 19, 2012, Diamond instructed CCCLS that it should use hydrogen peroxide as a bleaching agent at the new facility instead of chlorine. Id. ¶ 26. However, around this time, the Town of Hyannis Water Department changed its use of chemical additives to the Hyannis water supply; the result of this was that iron and polyphosphates in the

water caused yellowing and rust-like stains. Id. ¶ 27. On June 29, 2012, Diamond communicated to CCCLS that "[i]t is our experience that laundering with water containing high iron levels is generally more effective when using peroxide, as opposed to chlorine bleach." Id. ¶ 31. After conducting an independent analysis of this issue, CCCLS experimented with various formulas and determined that it should replace hydrogen peroxide with chlorine bleach, which ameliorated the staining problem. Id. ¶ 33. Consequently, CCCLS directed Diamond to replace the hydrogen peroxide lines with chlorine lines, although Diamond did not do so in a timely manner. Id. ¶ 34.

On April 28, 2012, an employee of Diamond, Jack Hall, placed chemical feed lines into the wrong ports on a "275# Milnor Washer" at the CCCLS facility. Id. ¶ 35. CCCLS alleges that this caused significant damage to the washer. Id. ¶ 35-37.

On September 7, 2012, CCCLS sent a letter to Diamond complaining of the deficiencies in Diamond's reporting and servicing. Id. ¶ 38. CCCLS avers that "[w]ithout proper reporting, Diamond was able to oversell more product to CCCLS than was necessary." Id. ¶ 43. CCCLS and Diamond met on September 25, 2012 to discuss CCCLS's complaints. Id. ¶ 46. After this meeting, Hall (of Diamond) modified the formula used at CCCLS, representing that he halved the amount of chemical usage. Id. ¶ 48. CCCLS alleges that Diamond deliberately delayed doing so until after the "busy summer season" had ended, which maximized its use of Diamond's chemicals. Id. CCCLS served Diamond with a demand letter on December 17, 2012, claiming that Diamond had engaged in unfair and deceptive trade practices. Id. ¶ 55.

IV. Procedural History

On February 25, 2013, CCCLS filed the instant action alleging claims for breach of warranties (Count I), negligence (Count II), breach of contract (Count III), misrepresentation

(Count IV) and violation of Mass. Gen. L. c. 93A (Count V). D. 1. CCCLS amended its complaint on March 13, 2013, ostensibly asserting the same claims. D. 6. On March 22, 2013, Diamond moved to dismiss. D. 7. The Court heard oral argument on the motion and took it under advisement. D. 27.

V. Discussion

A. The Limitation of Liability Clause Does Not Bar The Claims Asserted

Diamond's first argument is that paragraph 12 of the Supply Agreement bars each of CCCLS's claims. D. 8 at 5-6.

As the Supply Agreement is a contract for the sale of goods, Article 2 of Massachusetts's iteration of the Uniform Commercial Code applies to its interpretation.[2] Mass. Gen. L. c. 106, § 2-102. As a general matter, parties may contract to limit damages arising out of an Article 2 contract unless the limitation is unconscionable. Id. at § 2-719; Canal Elec. Co. v. Westinghouse Elec. Corp., 406 Mass. 369, 374 (1990) (finding that a contractual bar to the recovery of consequential damages "is a reasonable business practice" and that "the consensual allocation of risk is not contrary to public policy"). Under Massachusetts law, however, "parties cannot easily contract out of liability for tortious behavior." Burten v. Milton Bradley Co., 763 F.2d 461, 465 (1st Cir. 1985) and cases cited (noting that contractual limitation of liability must be clear and unambiguous and are against public policy where they bar claims for grossly negligent or intentional conduct). Nor can parties contract out of liability under c. 93A where the claim arises from misrepresentation. Cambridge Plating Co. v. NAPCO, Inc., 85 F.3d 752, 769 n.18 (1st Cir.

[2]Although courts generally do not consider documents outside the complaint at the motion to dismiss stage, courts may consider documents attached and/or incorporated into the complaint. Watterson v. Page, 987 F.2d 1, 3 (1st Cir. 1993). CCCLS attached the Supply Agreement to its complaint. D. 6-1 at 23. Accordingly, the Court may consider it in deciding the instant motion.

1996) (finding that limitation-of-damages provision does not apply to consequential damages arising from a Chapter 93A claim "predicated on conduct amounting to an intentional misrepresentation and willful breach of warranty"). In addition, unambiguous contractual provisions such as this one "must be enforced strictly to [their] terms." Schwanbeck v. Fed.-Mogul Corp., 412 Mass. 703, 706 (1992).

Here, paragraph 12 of the Supply Agreement states that Diamond shall not be liable "for any damage or injury . . . allegedly resulting or arising from, or related to or based upon, directly or indirectly, the Products or misuse of the Products by [CCCLS] or by third parties." D. 6-1 at 23. Thus, the limitation of liability clause is expressly limited in scope by its terms to damage resulting either from (a) the Products themselves; or (b) the misuse of the Products by either CCCLS or a third party. See Crisp Human Capital Ltd. v. Authoria Inc., 613 F. Supp. 2d 136, 141 (D. Mass. 2009) (finding that a limitation clause in the parties' agreement did not apply to misrepresentations). Plainly then, paragraph 12 of the Supply Agreement provision does not apply to Diamond's own conduct.

Count I alleges breach of various warranties, arising at least in part from Diamond's conduct and not the Products themselves. D. 6 ¶¶ 58-68. Count II alleges that Diamond negligently caused damage to the Milnor Washer. This too is a service countenanced by the Supply Agreement and therefore falls outside the scope of paragraph 12. Id. ¶¶ 35-37. Count III alleges a breach of the Supply Agreement itself. Moreover, as discussed further below, CCCLS's breach of contract claim arises, at least in part, out of Diamond's own conduct and not CCCLS's use of the Products supplied by Diamond. Count IV alleges either fraudulent or negligent misrepresentation, which arises out of Diamond's statements and not CCCLS's use or misuse of the Products. D. 6 ¶ 10. Finally, Count V alleges unfair and deceptive conduct in

violation of c. 93A. Although limitation of liability clauses can under certain circumstances bar such claims, Canal Elec. Co. v. Westinghouse Elec. Corp., 406 Mass. 369, 377 (1990) (concluding, on certified questions, that plaintiff could validly waive c. 93A claim), CCCLS's claim here is that Diamond deliberately or negligently withheld material information from CCCLS as to the efficacy of the Products, which falls outside the plain language of paragraph 12. D. 6 ¶¶ 48-50. Accordingly, on this record, the Court cannot strain to construe paragraph 12 so broadly as to conclude that such conduct was "resulting or arising from . . . the Products or use or misuse of the Products by [CCCLS] or by third parties." D. 6-1 at 23 ¶ 12.

B. CCCLS Has Alleged a Cognizable Breach of Warranty Claim

Diamond argues that the limitation of warranties in the Supply Agreement prevents CCCLS from recovering on its breach of warranty claim. D. 8 at 7-9. CCCLS has asserted that Diamond breached (1) the express "standard warranty" described in paragraph 11 of the Supply Agreement, and (2) a separate warranty created by the words "Performance Assured" on a document allegedly attached to the Supply Agreement by failing to install its equipment in a timely manner, failing to address its concerns in a timely manner and incorrectly installing equipment as promised by Diamond. D. 6 ¶ 61. CCCLS also alleges that Diamond breached implied warranties, including the implied warranty of workmanlike performance, by the same conduct. Id. ¶ 65. Diamond argues that these claims are barred by paragraph 11 of the Supply Agreement, which acknowledges the applicability of Diamond's "standard warranty" but "disclaims all other warranties, express or implied, including but not limited to the implied warranties of merchantability and fitness for a particular purpose with respect to the Products." D. 6-1 at 23. CCCLS counters that its claims fall outside the scope of paragraph 11's limitations and that the provision is unconscionable. D. 13 at 5.

As a general matter, "conspicuous disclaimers or limitations on warranties will only be ignored when unconscionable." Logan Equip. Corp. v. Simon Aerials, Inc., 736 F. Supp. 1188, 1197 (D. Mass. 1990). A contractual term can either be substantively unconscionable or procedurally unconscionable. Zapatha v. Dairy Mart, Inc., 381 Mass. 284, 294 n.13 (1980). A determination of whether a contractual provision is unconscionable, as CCCLS argues here, is an "intensely factual question with both procedural and substantive components," In re DiMare, 462 B.R. 283, 307 (Bankr. D. Mass. 2011), which here should be determined on a developed record. See Stratus Technologies Bermuda Ltd v. EnStratus Networks, LLC, 795 F. Supp. 2d 166, 169 (D. Mass. 2011) (denying motion to dismiss trademark claim where defendant disputed many of the factual allegations in the complaint).

In addition, the parties dispute the exact nature of the warranties that apply here. CCCLS alleges that the statement "Performance Assured" constitutes an express warranty, D. 6 ¶ 61, and as alleged is part of the parties' agreement, despite Diamond's argument to the contrary. The Court must accept CCCLS's allegations as true at this juncture and factual questions about the scope of the parties' obligation should be resolved on a developed record. Kling v. Fid. Mgmt. Trust Co., 270 F. Supp. 2d 121, 132 (D. Mass. 2003) (citation omitted).

Further, CCCLS alleges in part that Diamond breached the implied warranty of workmanlike performance by, for example, failing to install equipment correctly. D. 6 ¶ 65. By its very nature, this warranty relates not to the Products, but to Diamond's conduct with respect to its maintenance of the equipment as described in paragraph 7. Paragraph 11, however, limits recovery for breach of warranty only as it pertains to the Products. D. 6-1 at 23.

Finally, CCCLS alleges that Diamond breached the "standard warranty" described in paragraph 11. D. 6 ¶ 61. Paragraph 11 of the Supply Agreement expressly states that the

limitation provision does not exempt claims for breach of Diamond's "standard warranty." D. 6-1 at 23. Moreover, Diamond concedes that its standard warranty is exempted from the limitation of warranties clause. D. 8 at 2. In the amended complaint, CCCLS alleges Diamond's deficient performance of its obligations under the Supply Agreement, that the agreement incorporates a standard warranty (Paragraph 11) and that "Diamond breached the express warranties in the Supply Agreement." D. 6 ¶¶ 58-64. In light of these allegations in the operative pleading, the Court cannot say on this record that CCCLS has not at least alleged a plausible breach of the standard warranty.

C. CCCLS Has Alleged a Plausible Negligence Claim

"To prevail on a negligence claim, a plaintiff must prove that the defendant owed the plaintiff a duty of reasonable care, that the defendant breached this duty, that damage resulted, and that there was a causal relation between the breach of the duty and the damage." Jupin v. Kask, 447 Mass. 141, 146 (2006).[3]

There are two sets of alleged facts here that could plausibly give rise to a negligence claim. The first set of facts relate to allegations that Diamond negligently provided CCCLS advice to Diamond regarding the chemical additives CCCLS should use. D. 6 ¶ 31. The second set of facts relate to allegations that Diamond negligently installed the Milnor Washer. Id. ¶ 35. As to the first set of facts, Diamond argues that CCCLS has failed to allege proximate cause. According to Diamond, the proximate cause of the damage suffered by CCCLS was the Hyannis

[3] Diamond notes that in describing the negligence claim, CCCLS impermissibly incorporated prior paragraphs of the amended complaint by reference. D. 8 at 9. The Court agrees with CCCLS, however, that incorporation of prior paragraphs is a common and accepted practice. Chaabouni v. City of Boston, 133 F. Supp. 2d 93, 95 (D. Mass. 2001). The Court declines to dismiss Count II on this ground.

Water Department changing the chemical additives in the Hyannis water supply and not the Products or services that Diamond provided. D. 8 at 10.

Even assuming *arguendo* that Diamond is correct (a factual determination that the Court will not make now), the Court finds that the second set of facts relating to the Milnor Washer plausibly states a claim for negligence. Here, CCCLS has alleged that Diamond owed CCCLS a contractual duty to maintain the Equipment, Diamond breached that duty by incorrectly connecting the chemical feed lines on the Milnor Washer, several thousands of dollars of damage resulted and Diamond's negligence caused the damage. D. 6 ¶¶ 35-37. As CCCLS has alleged a plausible negligence claim, the Court DENIES Diamond's motion to dismiss to the extent it seeks dismissal of Count II.

D. <u>CCCLS Has Stated a Plausible Breach of Contract Claim</u>

Diamond has also moved to dismiss the third count in CCCLS's complaint, a breach of contract claim. CCCLS points to three paragraphs of the complaint that address the ways in which Diamond has breached agreements between the parties. D. 13 at 14 (citing D. 6. ¶¶ 41-43). Although some of these paragraphs refer to agreements other than the Supply Agreement, at least ¶ 43 alleges a violation of the Supply Agreement in that Diamond is alleged to have failed to provide an adequate reporting of its costs. D. 6 ¶ 43 (referencing D. 6-1 at 48). In addition, CCCLS alleges that Diamond breached separate agreements pertaining to Diamond's failure to provide adequate service and deliver on its prior representations, assurances and agreements regarding managing the application of its products. D. 6 ¶¶ 41-42. Namely, CCCLS asserts that Diamond promised to provide CCCLS with a "comprehensive full service program that would direct . . . when formula or programming modifications are necessary," D. 6 ¶ 10, but failed to do so.

Diamond disputes that it is party to any contract with CCCLS other than the Supply Agreement, pointing to the merger clause in paragraph 10 of the Supply Agreement, D. 6-1 at 23. Putting aside whether paragraph 10 precludes the consideration of earlier agreements, see Cady v. Marcella, 49 Mass. App. Ct. 334, 338 (2000) (citing Robert Indus., Inc. v. Spence, 362 Mass. 751, 754 (1973)); see also Sax v. DiPrete, 639 F. Supp. 2d 165, 170 (D. Mass. 2009) (citation omitted), CCCLS also relies upon contentions alleging a plausible breach of contract claim, namely alleged breach of the Supply Agreement. Specifically, CCCLS alleges that Diamond did not comply with its contractual obligation to engage in "proper reporting," D. 6 ¶ 43, such that Diamond failed to fulfill its obligations in regard to pricing (i.e., failing to report prevented CCCLS from determining whether Diamond had complied with its obligations regarding cost) and setting the proper chemical formula (i.e., when "any extraordinary circumstance . . . necessitates increased use of chemicals"). Id. (citing Paragraphs 4 and 5 of the Supply Agreement). Moreover, CCCLS alleges that Diamond delayed its adjustment of the quantity of product "until after the busy summer season," id. ¶ 48, which again implicates Diamond's obligations under the Supply Agreement. That is, at a minimum, Count III states a plausible claim for breach of the Supply Agreement.

E. CCCLS Has Stated a Claim for Negligent Misrepresentation and Has Failed To State Facts Plausibly Supporting a Fraudulent Misrepresentation Claim, But May Amend Its Complaint

Diamond also moves to dismiss CCCLS's claim alleging fraudulent or negligent misrepresentation. Diamond's challenge to CCCLS's misrepresentation claim is of the same ilk as its challenge to CCCLS's negligence claim; Diamond argues that CCCLS has failed to allege facts supporting each element of fraudulent or negligent misrepresentation.

To assert a claim for negligent misrepresentation[4] in Massachusetts, as CCCLS does in Count IV, a plaintiff must allege that the defendant:

> (1) in the course of his business, (2) supplied false information for the guidance of others (3) in their business transactions, (4) causing and resulting in pecuniary loss to those others (5) by their justifiable reliance on the information, and that he (6) failed to exercise reasonable care or competence in obtaining or communicating the information.

Braunstein v. McCabe, 571 F.3d 108, 126 (1st Cir. 2009) (quoting Gossels v. Fleet Nat'l Bank, 453 Mass. 366, 902 (2009)) (internal quotation marks omitted). To assert a claim for fraudulent misrepresentation in Massachusetts, as CCCLS does in Count IV, a plaintiff must allege that the defendant:

> [1] made a false representation of material fact [2] with knowledge or recklessness as to its falsity [3] for the purpose of inducing the plaintiff to act, [4] and that the plaintiff reasonably relied upon the representation as true and acted upon it [5] to its detriment.

Taylor v. Am. Chemistry Council, 576 F.3d 16, 31 (1st Cir. 2009) (quoting Russell v. Cooley Dickinson Hosp. Inc., 437 Mass. 443, 458 (2002)). In addition, to survive a motion to dismiss, plaintiffs must plead claims for intentional misrepresentation with particularity. Fed. R. Civ. P. 9(b); McKenna v. Wells Fargo Bank., N.A., 693 F.3d 207, 218 (1st Cir. 2012) (requiring plaintiff claiming intentional misrepresentation to plead with particularity); but see Masso v. United Parcel Serv. of Am., Inc., 884 F. Supp. 610, 615 (D. Mass. 1995) (noting that "Rule 9(b) does not apply to a count alleging a negligent misrepresentation"). This requirement is generally satisfied where plaintiffs plead the time, place and content of the alleged misrepresentation. United States ex rel. Heineman-Guta v. Guidant Corp., 718 F.3d 28, 34 (1st Cir. 2013).

Here, CCCLS has identified Diamond's representations in its proposal as the basis for its claims for misrepresentation. D. 13 at 15. Thus, as an initial matter, Diamond argues that the

[4] CCCLS alleges fraudulent and negligent misrepresentations in the same count.

merger clause in paragraph 10 of the Supply Agreement bars relief. D. 8 at 13 n.6. Although a merger clause may prevent parties from asserting claims for breach of contract based upon misrepresentations made during the course of negotiations, see supra at § V.D, "[t]he settled rule of law is that a contracting party cannot rely upon such a clause as protection against claims based upon fraud or deceit." Sound Tech., 50 Mass. App. Ct. at 429. Merger clauses can bar claims for negligent misrepresentation, however, id. at 433, but only where it is demonstrated that the clause negates the plaintiff's reliance on the defendant's alleged statements, which courts can only determine "after some record has been established on a motion for summary judgment or after a trial." Marram v. Kobrick Offshore Fund, Ltd., 442 Mass. 43, 59-60 (2004). With these principles in mind, the Court considers whether the facts pled by CCCLS state claims for either fraudulent or negligent misrepresentation.

As to CCCLS's claim of negligent misrepresentation, Diamond is a business and made a proposal to CCCLS in the course of that business and in furtherance of a business transaction with CCCLS. D. 6 ¶¶ 3, 7, 9. CCCLS alleges that Diamond represented that it would provide CCCLS "with tunnel washing technology unparalleled in the industry" and "a comprehensive full service program" that would direct Diamond "when formula or programming modifications are necessary" and that Diamond's "senior management" would "be involved in the installation of [CCCLS's] facility." Id. ¶¶ 10-11. The Court infers from its complaints as to Diamond's services that these representations were false, id. ¶ 25, 38, and from CCCLS's acceptance of the proposal that it relied upon these representations, id. ¶ 13; see García-Catalán, 734 F.3d at 103 (noting that in deciding a motion to dismiss, the Court can make reasonable inferences from the allegations in the complaint to determine plausibility). CCCLS has stated that Diamond caused damages to CCCLS as a result of its failure to make modifications to its chemical formula. Id. ¶

28. The Court also reasonably infers from the amended complaint that CCCLS is alleging that Diamond was unreasonable to make the promises that it did in its proposal to CCCLS. Accordingly, CCCLS has plausibly stated a claim for negligent misrepresentation.

Having reached that conclusion, the Court concludes that CCCLS has not adequately pled its claim of fraudulent misrepresentation. Specifically, it has not pled facts consistent with the conclusion that Diamond knew or should have known that its statements were false at the time Diamond made them.[5] Sargent v. Tenaska, Inc., 914 F. Supp. 722, 731 (D. Mass. 1996) (noting that intent must be contemporaneous with misrepresentation to state claim for fraudulent misrepresentation), aff'd, 108 F.3d 5 (1st Cir. 1997). However, as the Court does not believe an amendment will be futile, it will grant CCCLS leave to amend its fraudulent misrepresentation claim.

F. CCCLS Has Adequately Pled its Claim Arising Under Mass. Gen. L. c. 93A

Diamond also argues that CCCLS has not adequately pled claim for unfair and deceptive business practices under Mass. Gen. L. c. 93A. To prevail on a Chapter 93A claim, the plaintiff "must prove that [1] a person who is engaged in trade or business [2] committed an unfair or deceptive trade practice and [3] that the [plaintiff] suffered a loss of money or property as a result." Brandon Assocs., LLC v. FailSafe Air Safety Sys. Corp., 384 F. Supp. 2d 442, 446 (D. Mass. 2005) (citing Bowers v. Baystate Tech., Inc., 101 F. Supp. 2d 53, 54–55 (D. Mass. 2000) (further citation omitted)).

"An act or practice is 'unfair' if it is 'within at least the penumbra of some common-law, statutory or other established concept of unfairness,' is 'immoral, unethical, oppressive, or

[5] The remaining elements of fraudulent misrepresentation being substantially similar to the elements of negligent misrepresentation, the Court dispenses with analysis on the remaining elements.

unscrupulous,' and 'causes substantial injury to consumers (or competitors or other businessmen).'" In re Pharm. Indus. Average Wholesale Price Litig., 582 F.3d 156, 184 (1st Cir. 2009) (quoting Mass Eye & Ear Infirmary v. QLT Phototherapeutics, Inc., 412 F.3d 215, 243 (1st Cir. 2005)). An act or practice is "deceptive" if it has the "capacity or tendency" to deceive. In re Pharm. Indus. Average Wholesale Price Litig., 582 F.3d 156, 185 (1st Cir. 2009) (citing Abruzzi Foods, Inc. v. Pasta & Cheese, Inc., 986 F.2d 605, 605 (1st Cir. 1993)). The "absence of separate liability is indicative, but not determinative, of the absence of c. 93A liability." Welch v. Barach, 84 Mass. App. Ct. 113, 122 (2013).

In this case, CCCLS has alleged: (1) that Diamond is engaged in trade or business, D. 6 ¶ 3; (2) pecuniary loss, id. ¶ 89; and (3) that the alleged deceptive practice occurred primarily within the Commonwealth. Id. ¶ 9. The central dispute is whether CCCLS has alleged an unfair or deceptive act or practice. D. 8 at 14-17. CCCLS alleges that Diamond has committed an unfair or deceptive trade practice by selling more of the Products to CCCLS than necessary and delaying their reduction until after the busy summer season had ended. Id. ¶¶ 43, 48-53. This conduct could plausibly amount to an unfair or deceptive trade practice in the nature of an overcharge. See Moniz v. Bayer Corp., 484 F. Supp. 2d 228, 231 (D. Mass. 2007) (denying motion to dismiss c. 93A claim where plaintiffs alleged that defendants fraudulently inflated prices). At oral argument, counsel for CCCLS suggested that Diamond had a history of overcharging CCCLS and that CCCLS entered into the Supply Agreement only based upon CCCLS's receipt of a credit and the "full-service program" described in Diamond's promotional materials. D. 6 ¶ 10. Counsel further argued that after Diamond "induced CCCLS to give it a second chance, it repaid CCCLS by [overcharging] it again."

VI. Conclusion

For the foregoing reasons, the Diamond's motion to dismiss, D. 7, is DENIED as to Counts I, II, III and V. As to Count IV, the Court ALLOWS CCCLS to amend its complaint re-pleading this claim within fourteen days of this Order.

So ordered.

/s/ Denise J. Casper
United States District Judge